ISSUE DATE: January 21, 1997

DOCKET NO. P-407,466/M-96-1111

ORDER RESOLVING ARBITRATION ISSUES

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Joel Jacobs	Chair
Marshall Johnson	Commissioner
Mac McCollar	Commissioner
Don Storm	Commissioner

In the Matter of Sprint Communications Company L.P.'s (Sprint's) Petition for Arbitration of with Contel of Minnesota, Inc. d/b/a/ GTE Minnesota (GTE) Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996	ISSUE DATE: January 21, 1997 DOCKET NO. P-407,466/M-96-1111 ORDER RESOLVING ARBITRATION ISSUES

PROCEDURAL HISTORY

I. THE STATUTORY AND REGULATORY FRAMEWORK FOR THE DEVELOPMENT OF LOCAL COMPETITION

In 1995, the Minnesota legislature enacted sweeping legislation opening the local telephone market to competition. Minn. Stat. § 237.16 imposed a number of obligations on providers of telephone service to facilitate the development of a competitive market and to protect the public interest.

On February 8, 1996, the President signed into law the Telecommunications Act of 1996 (the Federal Act or Act). The Act's stated purpose is to provide the benefits of competition to U.S. citizens by opening all telecommunications markets to competition. (Conference Report to accompany S. 652). Markets will be opened to competition in three ways:

> (1) by requiring incumbent local exchange carriers to permit new entrants to purchase their services wholesale and resell them to customers;
>
> (2) by requiring incumbent local exchange carriers to permit competing providers of local service to interconnect with their networks on competitive terms; and
>
> (3) by requiring incumbent local exchange carriers to unbundle the elements of their networks and make them available to competitors on just, reasonable, and nondiscriminatory terms.
>
> 47 U.S.C. § 251(c).

Under the terms of the Act, a competitive local exchange carrier (CLEC or new entrant) desiring to provide local exchange service can seek agreements with an incumbent local

exchange carrier (ILEC or incumbent) relating to interconnection with the ILEC's network, the purchase of finished services for resale, and the purchase of the incumbent's unbundled network elements. 47 U.S.C. §§ 251 (c) and 252 (a).

If the ILEC and the CLEC cannot reach an agreement within the time frame specified in the Act, either party may petition the state commission to arbitrate specific unresolved issues and to order terms consistent with the terms of the Act. 47 U.S.C. § 252 (b).

On August 8, 1996, the FCC issued an Order and rules related to interconnection, resale, and access to unbundled network elements in its FIRST REPORT AND ORDER, FCC Docket No. 96-98, FCC 96-323 (FCC Order or FCC rules). The FCC Interconnection Order provided detailed rules to guide states in determining costs and setting prices for the implementation of local competition. Portions of the FCC Order and Rules have recently been stayed by the Eighth Circuit Court of Appeals.

On July 2, 1996, the Federal Communications Commission (FCC) issued an Order and rules related to number portability in its FIRST REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING, FCC Docket No. 95-116, FCC 96-286. (FCC Number Portability Order).

II. INITIATION OF THESE PROCEEDINGS BEFORE THE COMMISSION

On April 19, 1996 Sprint Communications Company L.P. (Sprint) served Contel of Minnesota, Inc. d/b/a GTE Minnesota (GTE) with a written request to negotiate under the Federal Act. The parties failed to reach agreement on the negotiated issues, and on September 25, 1996 Sprint petitioned the Commission for arbitration pursuant to the Act.

On October 30, 1996 the Commission issued its ORDER GRANTING PETITION ESTABLISHING PROCEDURES FOR ARBITRATION. In that Order the Commission referred the arbitration request to an Administrative Law Judge (ALJ) for hearing and set out the procedural format for the arbitration.

The Order also deferred action on GTE's claim that it was a rural carrier exempt from the Act's negotiation, interconnection, unbundling, and resale obligations under 47 U.S.C. § 251(f)(1), explaining the issue was being litigated in another case, In the Matter of AT&T Communications of the Midwest, Inc.'s Petition for Arbitration with GTE Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, Docket No. P-442,407/M-96-939. On October 25, 1996 the Commission issued an Order in that case denying the rural exemption claim.

III. THE PARTIES AND THEIR REPRESENTATIVES

The parties and their representatives are as follows:

Sprint was represented by Denton C. Roberts and Barbara A. Erker, 5454 West 110th Street, Overland Park, Kansas 66211.

GTE was represented by Charles E. Hoffman, Maslon, Edelman, Borman & Brand, 3300 Norwest Center, 90 South Seventh Street, Minneapolis, Minnesota 55402; Mark B. Bierbower, 1900 K Street Northwest, Washington, D.C.; and James C. Stroo, 100 GTE Drive, PO Box 307, Wentzville, Missouri 63385.

The Minnesota Department of Public Service (the Department) was represented by Julia E. Anderson, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101.

The Residential and Small Business Division of the Office of the Attorney General (RUD-OAG) was represented by Scott Wilensky, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101.

The Public Utilities Commission, not a party but the ultimate decisionmaker, appeared by staff member Jeffrey Nodland.

IV. EVIDENTIARY HEARINGS

The arbitration hearings were conducted by Administrative Law Judge Kathleen D. Sheehy. Hearings were held from November 18 to 19, 1996 in St. Paul, Minnesota. The record closed on December 11, 1996, upon receipt of the reply briefs.

The Administrative Law Judge filed her recommended arbitration decision on December 23, 1996. The decision addressed eight unresolved issues which the parties had included in a joint list of disputed issues.

V. CURRENT PROCEEDINGS BEFORE THE COMMISSION

On January 9, 1997 the Commission heard oral arguments from the parties and met to deliberate.

Upon review of the entire record of this proceeding, the Commission makes the following Findings of Fact, Conclusions of Law, and Order.

GENERAL FINDINGS AND CONCLUSIONS

I. JURISDICTION

The Commission has jurisdiction over this proceeding under § 252(b) of the Federal Act and § § 237.16 and 216A.05 of Minnesota Statutes.

Section 252(b) of the Act provides for state commission arbitration of unresolved issues related to negotiations for interconnection, resale and access to unbundled network elements. Specifically, it authorizes the Commission to "resolve each issue set forth in [an arbitration] petition and the response, if any, by imposing appropriate conditions . . .." 47 U.S.C. § 252(b)(4)(C).

Section 237.16 of Minnesota Statues vests the Commission with broad authority related to competitive entry, interconnection and the other matters raised in this arbitration. The Commission has the authority to prescribe the terms and conditions for the provision of local telephone service and any related construction in order to "bring about fair and reasonable competition . . . ." Minn. Stat. § 237.16, subd. 1(a).

The Commission also has authority to set terms for temporary interconnection under § 237.16, subd. 10, and to prescribe rules in virtually all the areas relevant to this arbitration, including network unbundling, number portability and service quality under § 237.16, subd. 8.

Section 216A.05 authorizes the Commission to investigate, hold hearings and issue orders in carrying out its statutory duties, which include the Commission's responsibilities under § 237.16.

II. DECISION STANDARD

In resolving the issues in this arbitration and imposing conditions, the Commission must do the following:

> (1) ensure that the resolution meets the requirements of § 251 of the Act, including any legally enforceable regulations prescribed by the FCC pursuant to § 251;
>
> (2) establish any rates for interconnection, services or network elements according to § 252(d) of the Act; and
>
> (3) provide a schedule for implementation by the parties.
>
> 47 U.S.C. § 252 (c).

The Commission may also establish or enforce other requirements of State law when addressing issues related to interconnection agreements under § 252. 47 U.S.C. § 252(e)(3).

In short, the Commission must impose terms and conditions in this proceeding that are just, reasonable, nondiscriminatory and fair to both the new entrant and the incumbent, consistent with the specific requirements set forth in federal and state law.

III. IMPACT OF 8TH CIRCUIT STAY OF CERTAIN FCC RULES

On October 15, 1996, the 8th Circuit Court of Appeals, in Iowa Utilities Board, et al. v. FCC, No. 96-3406, issued an order staying the following portions of the FCC's Interconnection Order, Appendix B-Final Rules:

> (1) sections 51.501-51.515, relating to pricing network elements, and interconnection;
>
> (2) sections 51.601-51.611, relating to avoided cost discount rates for resale;
>
> (3) sections 51.701-51.717, relating to pricing reciprocal transport and termination; and
>
> (4) section 51.809, relating to the availability of contract terms to other requesting carriers under § 252(I) of the Federal Act.

The Court also stayed a portion of the FCC's September 29, 1996 Order on Reconsideration, which established ranges of default proxy rates for various services and service elements.

On November 1, 1996, the Court issued an Order lifting the stay with respect to § 51.701 (scope of transport and termination pricing rules); § 51.703 (reciprocal compensation obligation of LECs for transportation and termination of traffic); and § 51.717 (renegotiation of existing non-reciprocal agreements).

The Commission has no legal obligation to apply the prices, methodologies or other directives in the stayed portions of the FCC Interconnection Order. The Commission, however, has taken administrative notice of the Order in its entirety and has considered the stayed portions of the FCC Order as it has other evidence in the case. Furthermore, the Commission notes that most of the FCC Order has not been stayed and that the Commission is bound by the requirements set forth therein.

IV. BURDEN OF PROOF

The Commission's October 30, 1996 Order initiating this proceeding placed the burden of proof on GTE "with respect to all issues of material fact." Order, p. 12. It required proof "by a preponderance of the evidence." Id. The Order further provided that the ALJ could "shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute," or reallocate the burden of proof to comply with any applicable FCC regulations.

Consistent with the Commission's decision on this issue, the FCC Interconnection Order places the burden on the incumbent to demonstrate the technical infeasibility of a CLEC's request for interconnection or unbundled access. 47 CFR § 51.321(d). The FCC Order specifically requires the incumbent to prove by clear and convincing evidence any claim that it cannot satisfy such a request because of adverse network reliability impacts. 47 CFR § 51.5.

The Commission reaffirms its decision to place the burden of proof on GTE with respect to the issues of material fact in this arbitration, subject to the caveats set forth in the Commission's procedural Order.

The Federal Act attempts to introduce competition into the monopoly markets of incumbent providers. It does this by imposing a number of specific duties on incumbent LECs, all aimed at giving new entrants reasonable and nondiscriminatory access to the networks of incumbents. The Act, in effect, puts the onus on incumbent LECs to open their markets to competitors. It follows then that the burden of proof in proceedings to implement the Act should fall on the incumbent, in this case GTE.

Assigning GTE the burden of proof not only comports with the thrust of the Act; it also recognizes that the incumbent controls or possesses most of the information needed to resolve the issues in this case. These issues, for the most part, relate to the cost, nature and technical configuration of the incumbent's network. GTE certainly possesses most of the relevant information on these matters. Requiring GTE to go forward with evidence was intended to help ensure the development of the record in this case in the short time allotted for this proceeding under the Federal Act.

V. FUTURE PROCEEDINGS

The Federal Act requires parties to submit "any interconnection agreement adopted by negotiation or arbitration . . . for approval to the State commission." 47 U.S.C. § 252(e)(1). The State commission must then "approve or reject the agreement, with written findings as to any deficiencies," within 90 days as to a negotiated agreement and 30 days as to an arbitrated contract.

The Act does not establish any deadline by which parties must submit a final contract. It leaves this to State commissions, directing them to provide in their arbitration decisions a schedule for implementation. 47 U.S.C. § 252(c).

The Commission will require the parties in this arbitration to submit their final contracts, containing all arbitrated and negotiated terms, no later than February 21, 1997. This will provide a reasonable period of 30 days for the parties to put their entire contracts together and craft any additional language that the Commission has not specifically ordered in this arbitration.

Both parties must include any objections they have to provisions of their contract. The parties must identify the specific language to which they object, explain the basis for the objection and provide alternative contract language.

The contract approval proceeding will offer the opportunity for broader public input on the terms of the arbitrated agreement ordered in this proceeding, which was, by necessity, limited to the negotiating parties and the two statutory intervenors. The Commission will require the parties to serve their contracts, on the date they are filed, on a service list designed to include interested members of the public.

That list will include all members of the advisory task force convened to advise and assist the Commission in developing its local competition rules. In the Matter of a Rulemaking Governing the Provision of Local Telecommunications Services in a Competitive Environment, P-999/R-95-53.

The Commission invites all interested persons to file comments on the final agreement. Comments must be received by the Commission no later than 10 days after parties submit their final contract to the Commission.

The approval proceeding will enable the Commission to (1) review, for the first time, provisions arrived at through negotiations; (2) take a final look, with the benefit of broader public input, at terms ordered in the arbitration; and (3) ensure that the final contract language comports with the Commission's decisions in this arbitration. The Commission will review the entire agreement for compliance with the relevant law and consistency with the public interest as required by the Federal Act. See 47 U.S.C. § 252(e).

VI. RECONSIDERATION

The Commission notes that the parties may file for reconsideration under the Commission's Rules of Practice and Procedure, Minn. Rules, part 7829.3000. The Commission, however, will vary those rules slightly to require that any filing for reconsideration be made within 10 days of this Order, rather than 20 days as currently provided in Minn. Rules, part 7829.3000, subp. 1. This will expedite the approval of a final contract consistent with the intent of the Act.

The Commission may vary its rules when the following conditions are met:

> (1) Enforcement of the rule would impose an excessive burden upon the applicant or others affected by the rule;
>
> (2) Granting the variance would not adversely affect the public interest; and
>
> (3) Granting the variance would not conflict with standards imposed by law.
>
> Minn. Rules, part 7829.3200

Allowing the full 20 days for reconsideration would unduly burden the parties, who would have very little time to review any such petition before the 30 day deadline for filing a final contract. Requiring parties to file for reconsideration within 10 days of this Order will ensure a timely, orderly process, giving the Commission and parties time to carefully and thoughtfully analyze issues raised on reconsideration before parties file their final contracts. This will clearly further the public interest. Varying the rule in this way does not conflict with any standards imposed by law.

The Commission expects any petitions for reconsideration to be presented with the specificity required under Minn. Rules, part 7829.3000, subp. 2. Objections to particular contract provisions ordered by the Commission should include explanations and supply alternative language.

The Commission may consolidate any hearings on reconsideration with the hearings in the contract approval proceeding to ensure the most efficient resolution of this docket. The Commission may, then, issue a single Order addressing the issues raised on reconsideration and approving or rejecting the final agreement.

SPECIFIC FINDINGS AND CONCLUSIONS

The arbitrated issues resolved in this Order can be grouped under four general categories:

I. Resale Restrictions and Wholesale Rates
II. Combining Unbundled Elements
III. Provision of Customer Information
IV. Contract Issues

The Commission will consider each of the arbitrated issues in turn.

I. RESALE RESTRICTIONS AND WHOLESALE RATES

A. The Issue

Under the Act ILECs are prohibited from imposing "unreasonable or discriminatory conditions or limitations" on the resale of their services. 47 U.S.C. § 251 (b) (1). They are also required to offer to CLECs at wholesale rates nearly every service they provide at retail. Wholesale rates are to be determined by subtracting avoided costs from retail rates.
47 U.S.C. § 252 (d) (3).

In this case GTE proposed to prohibit the resale of certain services (residential service, special services for disabled persons, promotional services, public and semi-public pay phone service) and proposed to make other services unavailable at wholesale rates (operator services, directory assistance, non-recurring charge services, individually-based contract services, COCOT[1] services, certain enhanced services).

The Company also proposed to apply the standard wholesale discount to services it was offering its own customers at promotional (discount) rates.

B. Applicable Law

The Federal Act bars LECs from prohibiting, or imposing unreasonable or discriminatory conditions on, the resale of its telecommunications services. 47 U.S.C. § 251 (b) (1). It also requires LECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. . ."
47 U.S.C. § 251 (c) (4) (A).

C. The ALJ's Recommendation

The ALJ recommended requiring GTE to permit resale of all disputed services and to require GTE to offer wholesale rates for all disputed services except public pay phones. She also recommended allowing GTE to charge standard wholesale rates for services it was offering its customers at promotional rates for 90 days or less.

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[1]COCOT is an acronym for Customer Owned Coin Operated Telephone. "COCOT services" has become a shorthand term for services provided to independent pay phone providers, whether or not their phones are exclusively coin-operated.

D. Commission Decision

The Commission accepts and adopts the ALJ's decision and reasoning, as set forth below.

1. Residential Service and Services to Disabled Persons

GTE contended it need not offer residential service at wholesale rates because residential retail rates are allegedly below cost. The Commission agrees with the ALJ that this does not exempt GTE from offering the service at wholesale.

Residential service fits squarely within the Act's definition of services that must be offered at wholesale rates -- it is a service provided at retail to subscribers who are not telecommunications carriers. 47 U.S.C.§ 251 (c) (4) (A). Furthermore, excluding residential customers from the benefits of competition, which are expected to include advanced telecommunications and information services, would be contrary to the purposes of the Act.[2]

Theoretically, as long as the wholesale rate consists of the retail rate minus the costs avoided by providing the service wholesale, GTE should be financially indifferent as to whether it sells the service wholesale or retail. Either way it experiences a revenue deficit that must be made up by selling other services over cost.

Furthermore, under GTE's existing rate structure, to whatever extent residential service is priced below cost, other services are priced enough above cost to give the company an opportunity to earn its authorized rate of return. Since the wholesale discount for these services, too, will be limited to avoided costs, they should continue providing the revenue contribution necessary to keep GTE whole.

For all these reasons, the Commission concludes residential service must be offered at wholesale under the Act.

Similarly, the Commission agrees with the ALJ that GTE must offer wholesale rates for services to disabled persons, including special features such as free calls to directory assistance. The company argued these services should be exempt because they are provided below cost for public policy reasons. This claim fails for the same reasons as the claim that residential services should be exempt from the wholesale requirement.

2. COCOT Coin and Coinless Lines

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[2]See the Conference Report to accompany S. 652, Report 104-458, which describes the Act as designed "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . ." Report, p. 1.

COCOT phones are pay telephones owned and operated by independent pay phone providers, who buy the underlying telecommunications services from local exchange and interexchange carriers. "COCOT" is an acronym for Customer Owned Coin Operated Telephone, but "COCOT services" has become a shorthand term for services provided to independent pay phone providers, whether or not their phones are exclusively coin-operated.

GTE claimed its COCOT rates were already wholesale rates which it should not be required to discount further. The Commission agrees with the ALJ that GTE must offer these rates at the wholesale discount.

The Act imposes a two-part test for services incumbent LECs must offer at wholesale. The incumbent LEC must "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers. . ." 47 U.S.C. § 251 (c) (4) (A).

First, COCOT services are clearly provided at retail, meeting the first prong of the statutory test. The independent pay phone provider does not resell the service it buys from GTE; it uses that service to put together a retail service of its own. COCOT services are no more wholesale services than equipment sales to independent pay phone providers are wholesale transactions. In both cases vendors are providing at retail the building blocks of another retail service.

Second, COCOT subscribers are not telecommunications carriers under 47 U.S.C. § 153 (44) - (46), but aggregators under 47 U.S.C. § 226 (a) (2). COCOT services therefore meet both prongs of the statutory test and must be offered at wholesale rates to CLECs.

3. Semi-public Pay Phones

Semi-public pay phones are pay telephones owned and operated by the LEC, which a premises owner, such as a restauranteur, pays the LEC to install on its premises as a convenience to its customers. GTE contended that this service, too, was a wholesale service not subject to further discount. The Commission, like the ALJ, disagrees.

Semi-public pay phone service is provided at retail -- the businesses subscribing to the service do not resell it. The first prong of the statutory test is therefore met. Since these businesses are also clearly not telecommunications carriers, the second prong is also met, and the service must be provided at wholesale rates.

4. Public Pay Phones

Public pay phones are pay telephones owned and operated by the LEC and provided at no charge to the premises owner. GTE contends it should not have to offer public pay services at wholesale to competitors. The Commission and the ALJ agree with GTE.

In the public pay phone context there is no purchase of goods or services -- retail or wholesale -- taking place between the LEC and the premises owner. To the extent that public pay phone service consists of providing service to premises owners, then, it fails the "at retail" prong of the statutory test.

While customers using pay phones are buying telecommunications service "at retail," they are not "subscribers" as that term is commonly understood.[3] To the extent that public pay phone service consists of providing service to members of the public, then, it fails the "subscribers [emphasis added] who are not telecommunications carriers" test.

5. Promotional Offerings

There was no dispute that GTE need not discount below the wholesale rate services it was offering its own customers at promotional (discounted) rates for 90 days or less. The Commission agrees that imposing such a requirement would essentially prevent incumbent LECs from using a traditionally effective marketing tool available to their competitors, which should be available to them as well.

At the same time, it is conceivable that promotions could be structured to be offered for 90 days and to continue providing benefits beyond that time. (For example, companies could offer reduced rates for twelve months to customers signing up during a 30-day period.) Such devices could allow incumbents to shift customers to non-standard offerings with which competitors could not compete at standard wholesale rates.

To provide clarity and prevent abuses, the Commission will require that, for a promotional service to be offered at the same wholesale rate as the full-priced service, all benefits under the promotion must be received by the customer within 90 days of the day the customer signs up. The Commission will also prohibit the incumbent LEC from offering consecutive 90 day discounts.

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[3]The American Heritage College Dictionary, third edition, provides the common meaning of "to subscribe": "to contract to purchase a certain number of issues of a publication, tickets to a series of events or performances, or a utility service, for example."

6. Other Disputed Services

The Commission agrees with the ALJ that GTE must offer the other disputed services at wholesale rates as well. All of these services -- operator services, directory assistance, non-recurring charge services, individually-based contract services, and disputed enhanced services -- are offered at retail to customers who are not telecommunications carriers. The Act therefore requires that they be offered for resale at wholesale rates. 47 U.S.C. § 251 (c) (4) (A).

7. Restrictions on Resale

The ALJ held, and the Commission agrees, that the only permissible restrictions on Sprint's resale of services purchased from GTE at wholesale are those set forth in the Act and the FCC Order. The Act provides that all incumbent LECs have the duty

> (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.
>
> 47 U.S.C. § 251 (c) (4).

The FCC Order establishes a rebuttable presumption that restrictions on resale are invalid, except for restrictions on selling residential service to business customers and lifeline services to ineligible persons.

The parties also agree that Sprint will not resell services to classes of customers other than those to whom GTE offers the services. This restriction is reasonable and will apply to services such as residential services, lifeline services, and discounted rates for schools and other not-for-profit entities.

II. Combining Unbundled Elements

A. The Issue

GTE asked the Commission to prohibit Sprint from combining unbundled service elements to replicate services that GTE offers wholesale. GTE claimed allowing Sprint to construct finished services from unbundled elements would be inconsistent with the Act's intent to encourage innovation through creative packaging of incumbents' and new facilities-based carriers' service elements.

Sprint opposed any prohibition on combining unbundled network elements.

B. Applicable Law

The Federal Act, § 251 (c)(3) requires the incumbent to provide nondiscriminatory access to network elements on an unbundled basis if such access is technically feasible. The Act further provides that "[a]n incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

The FCC Interconnection Order at Paragraph 292 states that "incumbent LECs may not restrict the types of telecommunications services requesting carriers may offer through unbundled elements, nor may they restrict requesting carriers from combining elements with any technically compatible equipment the requesting carriers own."

The FCC Interconnection Order at Paragraph 328 states: "We conclude, therefore, that Congress did not intend section 251 (c)(3) to be read to contain any requirement that carriers must own or control some of their own local exchange facilities before they can purchase and use unbundled elements to provide a telecommunications service."

C. The ALJ's Recommendation

The ALJ found that Congress and the FCC had spoken to this issue and decided that competitors could combine unbundled service elements to provide finished services.

D. Commission Decision

The Commission finds that the FCC Order on combining unbundled elements is clear: incumbents may not restrict their competitors' use of the unbundled elements under the FCC Rules. Although the FCC's interpretation of this issue is on appeal, it has not been stayed, and it is legally binding on the Commission unless and until that interpretation is invalidated.

III. Provision of Customer Information

A. The Issue

Sprint and GTE agreed that GTE will transfer a customer's basic services and accompanying vertical services (e.g., caller ID, call waiting) identified verbally by Sprint. The parties also agreed to comply with the long-term protections that will be established by the FCC on customer account information access in CC Docket 96-115. Further, they agreed that the protections included in Minn. Stat. § 237.66, subd. 1 (a), Minnesota's"slamming" law, should be included in the agreement.

The parties disagreed regarding Sprint's right to request the transfer of a customer "as is" (with all services the subscriber currently receives without Sprint identifying those services individually) or to demand this information from GTE without a written letter of authorization (LOA) from the customer. Sprint sought a contract clause providing such rights. GTE opposed Sprint's proposal.

GTE argued that unless there is a written LOA, or Sprint can identify the vertical services to be transferred, it should not be required to transfer the customer "as is". GTE noted that Section 222 (f) (1) (A) of the Act defines customer proprietary network information (CPNI) as

> information that relates to the quantity, *technical configuration, type,* destination, and amount of use of a telecommunications service subscribed to by any customer solely by virtue of the carrier-customer relationship; ...."

GTE argued that transferring a customer "as is" would reveal customer proprietary network information (CPNI) without the customer's written authorization and would, therefore, violate Section 222 of the Federal Act.

Sprint argued that GTE should be required to execute an "as is" service order for a customer switching to Sprint local service without requiring written customer authorization. Sprint noted that other LECs in the country have agreed to transfer GTE customers upon receipt of an "as is" service order from the CLEC. Sprint added that GTE's interpretation of the Act's restrictions on the disclosure of CPNI is unnecessarily broad, self-serving, and anticompetitive.

The Department argued that, to the extent that the customer requests orally for a transfer of all services currently subscribed to, GTE should be required to transfer customer account information "as is.

B. Applicable Law

The law cited by GTE, 47 U.S.C. § 222, regarding privacy of customer information does not in fact **prohibit** GTE from transferring "as is" customer account information prior to receiving written customer authorization. While § 222 (c) (2) states that a telecommunications carrier "shall disclose [CPNI] upon affirmative written request by the customer to any person designated by the customer", it does not prohibit such transfer in the case of oral approval. In addition, § 222(d) (1) clearly states that

> Nothing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to [CPNI] obtained from its customers...
>
> (1) to initiate, render, bill, and collect for telecommunications services;
>
> ....

At the same time, neither does any provision of the law **require** the disclosure of such information. In these circumstances, the Commission has no statutory mandate but is not without direction or authority. The Commission may exercise its general authority under the

Federal Act to arbitrate specific unresolved issues and to order terms consistent with the terms of the Act. 47 U.S.C. § 252 (b). In addition, Minn. Stat. § 237.16, subd. 1 (a) authorizes the Commission to prescribe the terms and conditions of service delivery, for the purpose of bringing about fair and reasonable competition for local exchange telephone services.

C. The ALJ's Recommendation

The ALJ noted that the FCC is currently undertaking a rulemaking in CC Docket No. 96-115 to determine the appropriate processes to protect CPNI. The ALJ stated that the FCC decision should be incorporated in to the parties' agreement but recommended that the Commission adopt no interim measure. The ALJ stated her belief that the FCC's decision was likely to be issued soon and argued that there was no need for an interim measure that may differ from the rule ultimately selected by the FCC. The ALJ noted that if the FCC did not rule on the issue in the near future, or if customers experienced "substantial difficulties" in making transfers of local exchange service, Sprint may seek to have this agreement modified by the Commission.

D. Commission Decision

The ALJ's recommendation to wait until the FCC issues its rule on the subject will not be followed. The Commission notes that the Act allows the disclosure of CPNI by GTE to a competing carrier when it is requested to initiate service. It is highly unlikely, therefore, that whenever the FCC rule is published it will attempt to prohibit ILECs from providing this information to CLECs such as Sprint in the absence of written customer authorization.

Moreover, it appears to the Commission that Sprint's proposed provision provides a reasonable provision for the interim (before the FCC issues its rule) and is likely to promote the pro-competition goals of the Federal Act and Minn. Stat. § 237.16, subd. 1 (a). while not jeopardizing any legitimate competing interest. GTE does not dispute the legitimacy of verbal transfers of service nor does it contest that it is the customer who owns his or her CPNI. Accordingly, the contract requirement that GTE provide "as is" customer information to Sprint when it learns from Sprint verbally that a customer has selected Sprint as its local service provider will be approved. Such a provision will eliminate one unnecessary red-tape barrier to change of service and hence facilitate competition.

IV. Most Favored Nation Clause

The parties did not agree whether the agreement should contain a provision requiring GTE, as the incumbent LEC, to make available to Sprint, as the CLEC, any price, term and/or condition offered to any carrier, as provided for in Section 51.809 of the FCC rules.

The most favored nation clause in the FCC Order, 47 CFR § 51.809, has been stayed by the Eighth Circuit Court of Appeals on the basis that it would harm the negotiation process required under the Act. The Eighth Circuit will ultimately resolve the issue on the merits.

In these circumstances, the Commission finds that it is unnecessary to include the disputed

clause in the contract. Any rights Sprint may have under this section of the Act will ultimately be determined by the courts. If the Eighth Circuit upholds this part of the FCC Order, then Sprint will have the ability to "pick and choose" without this being included in this agreement. Sprint can also assert its rights to the Commission under 47 U.S.C. §252 (I) outside the scope of this agreement.

V. Limitation of Liability

A. The Issue

The parties agreed that the agreement should contain provisions limiting GTE's liability for losses experienced by its customers in a wide range of situations, but disagreed on whether that limitation should extend to shield GTE from liability for losses experienced by Sprint due to network fraud resulting from GTE's negligence. GTE favored such contract language and Sprint opposed it. The Department argued that the laws of negligence that normally apply to commercial transactions should apply to this agreement and, hence opposed GTE's requested language.

B. Applicable Law

No party claimed that any law required or prohibited the provision in question, though Sprint and the Department argued that such a clause was inconsistent with "normal" commercial transactions. However, historically, the Commission has allowed telephone companies to include liability limitations in telephone company tariffs as referred to in Minn. Stat. § 237.07, subd. 1 and the Minnesota Court of Appeals has upheld a clause limiting a utility's liability for negligence while finding that liability may still remain for gross negligence as well as wilful or wanton acts of the utility. See Computer Tool & Engineering v. NSP, 453 N.W.2d 569 (Minn. Ct. App. 1990).

In the absence of statutory directives applicable to any particular question, the Commission uses its sound discretion in arbitrating each specific unresolved issue and ordering terms consistent with the terms of the Act. 47 U.S.C. § 252 (b).

Accordingly, the Commission must evaluate the policy basis for approving or eliminating the limitation of liability clause in question.

C. The ALJ's Recommendation

The ALJ recommended that the Commission disapprove GTE's proposed liability limitation clause. In the ALJ's view, there was no justification for asking Sprint to give up whatever rights it might have in the law of negligence to recover from GTE for GTE's negligent maintenance of its network.

D. Commission Decision

The Commission will not adopt the ALJ's recommendation and will require the parties' agreement to contain a clause limiting GTE's liability to Sprint for losses due to network fraud caused by GTE's negligence. In so doing the Commission maintains the status quo in the utility industry with respect to such clauses. The Commission's reasons for doing so are as follows:

Heretofore, in a wholly regulated environment, the Commission has found it appropriate to authorize the monopoly provider to shield itself from liability from all but its gross negligence and wilful and wanton acts. The policy basis for allowing such a limitation of liability is concern for the impact that wider potential liability would have on customer rates.

In this case, if GTE does not include a limited liability clause for network fraud in its interconnection agreement with Sprint, GTE may be exposed to broad liability. This could result in higher costs and higher rates to GTE's customers.

It is possible that in a legitimately competitive environment, which does not exist in the local service area at this time, it will be more appropriate to release that concern and allow the parties to adopt or not adopt such clauses, as their respective bargaining strength dictates. Until such time, the Commission is not convinced that its concern for customer rates, as reflected in its decision on this issue, is misplaced. The Commission notes that to date, such clauses are the industry norm and the record provides no basis for departing from that norm and initiating a new position on this issue. The potential ramifications of such a new position, particularly the pressure exerted thereby on GTE's rates (and, by precedent, upon the rates of other ILECs), have not been adequately examined.

VI. Provision for Future Modification

The FCC Rules indicate that a party violates the duty under the Act to negotiate in good faith if it refuses "to include in an arbitrated or negotiated agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules." 47 CFR § 51.301(c)(3).

Accordingly, the Commission will direct the companies to include a provision in their proposed final arbitrated contract to the effect that these agreements are subject to modification by negotiation or by future Commission Order.

ORDER

1. The Commission decides the arbitrated issues as set forth in the body of this Order.

2. Any party filing for reconsideration of this Order under Minn. Rules, part 7829.3000 shall do so no later than 10 days from the date of this Order. Any such petition shall include proposed contract language consistent with the party's position.

3. The parties shall file a final contract containing all arbitrated and negotiated terms no later than February 21, 1997 for review under 47 U.S.C. § 252 (e). If the parties are unable to reach agreement on specific contract provisions, they shall submit alternative language with detailed explanations of their objections to the other party's language.

4. The final contract shall include a provision stating it is subject to future modification by agreement of the parties or action of the Commission.

5. The parties shall serve their contract on the service list provided by the Commission. The contract must be served on the date they are filed with the Commission.

6. Any interested persons who wish to file comments on the final contract shall do so within 10 days of the date the final contracts are submitted.

7. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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